Supreme Court, U.S.
FILED
AUG 21 1991
OFFICE OF THE CLERK

(2)

No. 91-146

In the Supreme Court of the United States

October Term, 1991

MONONGAHELA POWER COMPANY,
Petitioner,

v.

CHARLES R. MILLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MEMORANDUM IN OPPOSITION

CARL N. FRANKOVITCH*
ARTHUR M. RECHT
MARK A. COLANTONIO
VOLK, FRANKOVITCH, ANETAKIS
RECHT, ROBERTSON & HELLERSTEDT
337 Penco Road
Weirton, WV 26062
(304) 723-4400

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI 2

I. The Petitioner Did Not Properly Assert Or Contest The Constitutional Issues It Now Presents To This Court And The Decisions Below Are Not Unconstitutional 2

II. The Post-Trial Award Of Prejudgment Interest Does Not Violate Monongahela Power's Right To Due Process 7

CONCLUSION 10

RESPONDENT'S APPENDIX .....

I. Order Dismissing Homer Laughlin China Company Dated January 5, 1988 ..... A-1

TABLE OF AUTHORITIES

CASES

Page

Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co., 406 U.S. 340 (1972) (per curiam) 4

Atlantic Purchasers, Inc. v Aircraft Sales, Inc., 705 F.2d 712-717 (4th Cir.), *cert. denied*, 464 U.S. 848 (1983) 8

Bell v. Mutual Insurance Co., 332 S.E.2d 127 (W. Va.), *cert. denied*, 474 U.S. 936 (1985) 8

Berry v. Nationwide Mutual Insurance Co., ____ W. Va. ____, 381 S.E.2d 367 (1989) 8

Bugher v. Consolidated X-ray Service Corp., 705 F.2d 1426 (5th Cir.) *cert. denied*, 473 U.S. 904 (1985) ... 8

Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974) 3

Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7 (1st Cir. 1987) 8, 9

City of West Haven v. Liberty Mutual Insurance Co., 639 F. Supp. 1012 (D.Conn. 1986) 8

Couch v. Thomas, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985) 3, 4

Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co., 115 F.2d 277, 282 (4th Cir.), *cert. denied*, 312 U.S. 702 (1940) 6

Feres v. United States, 340 U.S. 135 (1950) 5

Grove v. Myers, ____ W. Va. ____, 382 S.E.2d 536 (1989) 7

Page

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) 4

Hudson v. Union Carbide Corp., 620 F. Supp. 558 (N.D. Ga. 1985) 4

Jones v. Laird Foundation, Inc., 156 W. Va. 479, 195 S.E.2d 821 (1973) 6

Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp., 438 S.W.2d 788 (Ky. 1969) 4

L.M. Duncan & Sons v. City of Clearwater, 478 So.2d 816 (Fla. 1985) 4

Lockheed Aircraft Corporation v. United States, 460 U.S. 190 (1983) 4, 6

Middlewest Concrete Forming & Equipment Co. v. General Insurance Co. of Am., 165 W. Va. 280, 267 S.E.2d 742 (1980) 8

Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 290 N.W.2d 276 (1980) 4

National Fruit Product Co. v. Baltimore & Ohio R.R. Co., ____ W. Va. ____ 329 S.E.2d 125 (1985) 6

Raisler v. Burlington Northern R.R. Co., 219 Mont. 254, 717 P.2d 535 (1985) 4

Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) 5

Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4 (Fla. 1975) ... 3, 4

Sydenstricker v. Unipunch Products, Inc., 169 W. Va. 440, 288 S.E.2d 511 (1982) 3, 6

Page

Tsarnas v. Jones & Laughlin Steel Corp., 418 Pa. 513, 412 A.2d 1094 (1980) 4

Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963) 5

Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) 8

STATUTES AND RULES

Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§901-950 4

Fed. R. Civ. P. 54(c) 8, 9

W. Va. R. Civ. P. 54(c) 8, 9

North Carolina Unfair Trade Practices Act 8

West Virginia Code §23-2-6 1

West Virginia Code §23-4-2 (Supp. 1991) 6

West Virginia Code §56-6-31 (1981) 7

I

STATEMENT

This case is the classic example of liability imposed under established state law tort principles. The genesis of this case occurred when the Respondent, Charles Miller, was severely injured when he inadvertently entered an unmarked electrical substation owned by the Petitioner, Monongahela Power Company ("Monongahela Power"), instead of a substation owned and located on property of his employer, Homer Laughlin China Company ("Homer Laughlin"). Testimony at the trial of this matter indicated that Monongahela Power deliberately failed to mark or identify the substation in question and had intentionally induced confusion about the ownership of the substation so as to discourage vandals and others who might be inclined to trespass on Monongahela's property. Petitioner's App. A at 10a. It was the intentionally created confusion as to the ownership of the electrical substation which caused Miller to enter the substation and come in contact with electrical power far in excess of that with which he was prepared to work.

The Complaint filed in this action originally joined the Petitioner, Monongahela Power, on grounds of negligence and strict liability as well as Miller's employer, Homer Laughlin, under West Virginia's deliberate intent exception to Workers' Compensation immunity as set forth in W. Va. Code § 23-2-6. During the nearly eight years in which Monongahela Power and Homer Laughlin were codefendants, Monongahela Power failed to file a cross-claim against its codefendant under any theory which it now asserts for the basis of relief in this Court. On January 5, 1988, without objection and with the express

consent of Monongahela Power, Homer Laughlin was dismissed with prejudice as a party to the action. Respondent's App. 1. At no time prior to Homer Laughlin's dismissal or to this date did Monongahela Power seek indemnity or contribution from Homer Laughlin. Judgment was rendered on the basis of the negligence of Monongahela Power in favor of Charles Miller.

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

The positions now presented by Monongahela Power were never fully raised, expressed, developed or ruled on by the lower courts. This case does not present issues of overriding public importance, and the decisions below are appropriate applications of settled legal principles that do not violate constitutional protections. Accordingly, there is no reason for this Court to exercise its discretionary power of review.

I. The Petitioner Did Not Properly Assert Or Contest The Constitutional Issue It Now Presents To This Court And The Decisions Below Are Not Unconstitutional

While Monongahela Power does not precisely describe the relief to which it claims to be entitled, it complains that it has been unconstitutionally denied the right of contribution from Homer Laughlin, Miller's employer (Petitioner's Brief 22). Monongahela Power has never asserted any claim for contribution and accordingly its right to contribution has not been passed on or denied. Therefore, under West Virginia law, assuming that Monongahela Power has not waived its right to contribution by its consent to the dismissal with prejudice of Homer Laughlin, then Monongahela Power would continue to have the right to assert

such a claim for contribution against Homer Laughlin in a separate proceeding to be commenced in the Circuit Court of Hancock County, West Virginia. *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982). If such a claim for contribution were to be filed and denied, then under the principles that Monongahela Power has set out in their brief, Monongahela Power could seek review by the West Virginia Supreme Court of Appeals and ultimately this Court when the party against whom relief is sought (Homer Laughlin) is properly before the Court. Thus, even if the Question Presented were worthy of consideration by this Court, this case is not a good vehicle for deciding it because Monongahela Power has failed to keep all relevant parties in the case, and there will be no party arguing against allowing indemnification as the proper solution to the purported constitutional conundrum.

Monongahela Power has cited cases from various jurisdictions to purportedly support its claim of constitutional infirmity in the application of the West Virginia Workers' Compensation Statute, e.g, *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985); *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975); *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974). These cases do not support review for several reasons, first, every case cited by Monongahela Power has properly included the third-party claim against the employer. Obviously, since contribution can be had only from the employer in the case sub judice, the employer (Homer Laughlin) must be a party to any such proceeding.

Moreover, only one of the cases which Petitioner cites as supporting its position, *Carlson v. Smogard*, 215

N.W.2d 615 (1974), purports to be controlled by constitutional principles, although the Court there relied on both state and federal constitutional provisions in a most conclusory manner. The other cases cited by Monongahela Power turn on statutory interpretations, *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), *Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969), or contractual and state constitutional provisions, *L.M. Duncan & Sons v. City of Clearwater*, 478 So.2d 816 (Fla. 1985) and *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975).

Contrary to Monongahela Power's assertions, West Virginia's tort and compensation system of joint and several liability and employer immunity is not an idiosyncratic anomaly unique to West Virginia. Similar tort concepts exist throughout American jurisprudence without violating constitutional standards. *Hudson v. Union Carbide Corp.*, 620 F. Supp. 558 (N.D. Ga. 1985); *Raisler v. Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas v. Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 290 N.W.2d 276 (1980).

This Court has considered virtually the same issues as those presented in this action in *Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co.*, 406 U.S. 340 (1972)(per curiam), and *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), where this Court refused to allow third-party tort-feasors to obtain contribution from employers who were covered by the limitation of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950). In *Lockheed Aircraft Corporation v. United States*, 460 U.S.

190 (1983) and in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), cited by the Petitioner, the issue of third-party indemnity was resolved solely on the basis of statutory interpretation to permit the indemnity claims by the third party against the employer. The issue of limiting third-party claims against employers was also before this Court in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) in which the plaintiff was injured when the ejection seat of a jet fighter malfunctioned during flight permanently injuring the pilot. The pilot sued Stencel, the manufacturer of the ejection system, for negligence. Stencel cross-claimed against the United States for indemnity. Stencel claimed it was passively negligent while the government's active negligence caused the injuries. The pilot, like Miller in this action, had received compensation. This Court dismissed Stencel's third-party claims under the limitation of liability provision of *Feres v. United States*, 340 U.S. 135 (1950), which immunizes the United States from a claim asserted by a member of the military, which is essentially identical to the immunity of the employer in the state of West Virginia (Homer Laughlin) from a claim asserted by an employee (Miller).

West Virginia maintains a comprehensive system of Workers' Compensation which includes the balancing of interests of the employee, employer and third parties. Besides granting recovery to employees against non-negligent employers and denying contribution claims grounded in negligence by third parties against employers, the system also provides protection for third-party tortfeasors by precluding employers from recovering Workers' Compensation benefits paid to employees injured by negligent third parties, all as part of the *quid pro quo* in the balancing of the competing interests of the employee,

employer and third parties. *Lockheed, supra*, at 198. *National Fruit Product Co. v. Baltimore & Ohio R.R. Co.*, W. Va. , 329 S.E2d 125 (1985) and *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co.*, 115 F.2d 277, 282 (4th Cir.), *cert. denied*, 312 U.S. 702 (1940). It is imperative to note that both employees and third parties are afforded the identical right to recover from an employer either directly or by contribution, providing the claim is based upon an injury from conduct rising to a standard of deliberate intent. *Sydenstricker*, 288 S.E.2d at 511; W. Va. Code § 23-4-2 (Supp. 1991). Also included within this comprehensive statutory scheme is West Virginia's treatment of the receipt of Workers' Compensation benefits as a collateral source as it relates to third-party tort-feasors. *See Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). Petitioner's argument is merely a veiled attempt to avoid the collateral source rule as established and applied in West Virginia.

In summary, the Court should decline Petitioner's invitation to open up Pandora's Box—really a reopening of substantive due process issues that were settled in the first half of this century—by constitutionalizing the tort system. But even if the Court were to join this opening foray into a constitutional thicket, it should wait for a case in which all parties, including not just the employee and the third party but also the would-be indemnitor, the employer, are before the Court so that there is a concrete controversy involving all the relevant parties, all of whom can thus argue for their respective interests.

II. The Post-Trial Award Of Prejudgment Interest Does Not Violate Monongahela Power's Right To Due Process.

Petitioner had every opportunity to argue against the award of prejudgment interest and to argue concerning the amount, but its argument is that the Due Process Clause regulates the timing during state court litigation when the issue must be raised and decided, by requiring the plaintiff to file a document mentioning prejudgment interest at some time before verdict. In our view, this contention borders on the frivolous.

Petitioner asserts that it has been denied due process because the plaintiff's Complaint did not set forth a demand for prejudgment interest and that it was otherwise not aware that prejudgment interest might be awarded by the Court. Such a claim ignores the fact that under West Virginia law prejudgment interest is mandated by statute pursuant to W. Va. Code § 56-6-31 (1981), whereby every judgment which includes special damages bears interest from the date the cause of action arose. This statutory imposition of prejudgment interest, which has been in effect since 1982, was subject to judicial interpretation in *Grove V. Myers*, ____ W. Va. ____, 382 S.E.2d 536 (1989), which was decided prior to the instant case and which held that the addition of prejudgment interest is a ministerial duty of the Court under W. Va. Code § 56-6-31 (1981), and a defendant must submit special interrogatories which permits the jury to set forth the special damages in their verdict to avoid imposition of interest on the entire amount of the verdict.

Petitioner apparently does not take issue with the statutory construction of W. Va. Code § 56-6-31 (1981) made by the West Virginia Supreme Court of Appeals but claims

that the demand for prejudgment interest must be plead in the Complaint as a matter of constitutional law. Rule 54(c) of the West Virginia Rules of Civil Procedure and Rule 54(c) of the Federal Rules of Civil Procedure are identical. This rule has consistently been held by the West Virginia Supreme Court of Appeals to permit a judgment to include all damages afforded under applicable law, irrespective of whether the relief is specifically demanded in the pleadings. *Berry v. Nationwide Mutual Insurance Co.*, ____ W. Va. ____, 381 S.E.2d 367 (1989); *Bell v. Mutual Insurance Co.*, 332 S.E.2d 127 (W. Va.), *cert. denied*, 474 U.S. 936 (1985); and *Middlewest Concrete Forming & Equipment Co. v. General Insurance Co. of Am.*, 165 W. Va. 280, 267 S.E.2d 742 (1980). This is not a novel interpretation of Rule 54(c) and is consistent with the great weight of authority in the Federal Courts. *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987); *City of West Haven v. Liberty Mutual Insurance Co.*, 639 F. Supp. 1012 (D.Conn. 1986); *Bugher v. Consolidated X-ray Service Corp.*, 705 F.2d 1426 (5th Cir.) *cert. denied*, 473 U.S. 904 (1985).

Petitioner suggests that *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7 (1st Cir. 1987) and *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712-717 (4th Cir.), *cert. denied*, 464 U.S. 848 (1983) are similar. In *Atlantic Purchasers*, however, the plaintiff received an award of compensatory and punitive damages and after the verdict was returned attempted to obtain a trebling of the compensatory award pursuant to the North Carolina Unfair Trade Practices Act. The 4th Circuit held that the plaintiff had elected punitive damages not treble damages pursuant to the statute and that such a fundamental

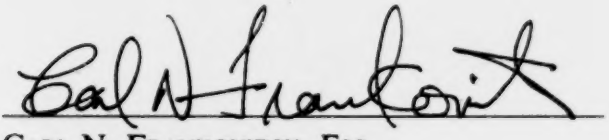
change should not be permitted after the verdict. Additionally, the Court noted that plaintiff in no instance would be entitled to both compensatory damages on the common law theory and the statutory treble damages. There certainly is no separate election of remedies in the case sub judice. In *Cianbro,* 814 F.2d at 7, the Court determined that the principal amounts being sought by the plaintiff were subject to a setoff and there was no principal to which the plaintiff was entitled. Accordingly, a claim for interest and costs of recovery were denied.

Petitioner then argues that it should not have been required to request a special interrogatory to the jury, breaking out special damages, becauses it had no notice that prejudgment interest would be sought. As already noted, this argument ignores the fact that prejudgment interest is mandated by statute in West Virginia and, therefore, advances the proposition that statuory law is to be disregarded unless specifically plead. This is hardly the result intended under Rule 54(c) of both the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure. In no event do these quibbles with West Virginia procedure rise to a constitutional challenge to the payment of prejudgment interest on damage awards in tort actions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



CARL N. FRANKOVITCH, ESQ.
ARTHUR M. RECHT, ESQ.
MARK A. COLANTONIO, ESQ.

VOLK, FRANKOVITCH, ANETAKIS,
RECHT, ROBERTSON & HELLERSTEDT
337 Penco Road
Weirton, WV 26062
(304) 723-4400

APPENDIX I

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

CHARLES R. MILLER, *Plaintiff,* vs. MONONGAHELA POWER COMPANY, a corporation, and HOMER LAUGHLIN CHINA COMPANY, a corporation, *Defendants.*	**CIVIL ACTION NO. 81-C-78 Sp**

DISMISSAL ORDER

On the 14th day of December, 1987, the plaintiff appeared by his attorneys, Arthur Recht and Carl N. Frankovitch; defendant, Monongahela Power, appeared by its attorney, Scott Blass; and defendant, Homer Laughlin China Company, appeared by its attorney, Raymond A. Hinerman, all pursuant to the Court's Notice of Status Conference on this date.

WHEREUPON, counsel for the plaintiff advised the Court that the plaintiff was willing to have the defendant, the Homer Laughlin China Company, dismissed with prejudice from this cause on the condition that further discovery, to which the plaintiff would otherwise be entitled if the defendant, the Homer Laughlin China Company, remained as a party, would be provided to the plaintiff by and through counsel for the Homer Laughlin China Company. Counsel for Homer Laughlin China Company advised the Court that this was an agreeable condition to

the dismissal as long as it was with prejudice and would be final.

There being no objection thereto and the Court perceiving none, it is accordingly ADJUDGED, ORDERED, and DECREED that the Homer Laughlin China Company is from this day forward dismissed with prejudice as a party defendant in this cause but shall respond to the plaintiff's discovery requests as though the defendant, the Homer Laughlin China Company remained as a party defendant.

Dated this 5th day of January, 1988.

ENTER:

/s/ GEORGE L. SPILLERS
Judge

HAVE SEEN:

/s/ CARL N. FRANKOVITCH, ESQ.
Counsel for Plaintiff

/s/ SCOTT BLASS, ESQ.
Counsel for Defendant,
Monongahela Power

/s/ RAYMOND A. HINERMAN, ESQ.
Counsel for Defendant,
Homer Laughlin China Company

CERTIFICATE OF SERVICE

I, Carl N. Frankovitch, counsel for Respondent, do hereby certify that I have caused three copies of the Memorandum in Opposition to be served on this 21 day of August, 1991, by first-class mail, postage prepaid, on counsel for Petitioner as follows:

William J. Murphy, Esq.
Robert T. Shaffer, III, Esq.
Seventh Floor
100 Light Street
Baltimore, MD 21202-1019

John B. Garden, Esq.
Jeffrey A. Holmstrand, Esq.
BACHMAN, HESS, BACHMANN & GARDEN
1226 Chapline Street
Wheeling, WV 26003

All parties required by the Rules of this Court to be served have been served.

CARL N. FRANKOVITCH, ESQ.
VOLK, FRANKOVITCH, ANETAKIS,
RECHT, ROBERTSON & HELLERSTEDT
337 Penco Road
Weirton, WV 26062

Telephone (304) 723-4400